No. 5129

IN THE

United States Circuit Court of Appeals For the Ninth Circuit

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DOLLAR STEAMSHIP LINE, a corporation,
Plaintiff in Error,

vs.

JEANETTE A. HYDE, United States Collector of Customs, Port of Honolulu,
Defendant in Error.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

Upon Writ of Error to the United States District Court of the Territory of Hawaii.

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STATEMENT OF FACTS.

In this action the Dollar Steamship Line sought recovery of a fine of one thousand dollars ($1000.00) imposed upon it by the defendant as Collector of Customs at the port of Honolulu, the amount of the fine and a forty dollar ($40.00) alien transportation charge having been paid under protest and involuntarily.

To the second amended complaint (R. pp. 17-22) a general demurrer was interposed and sustained with an exception reserved (R. p. 29). An election to stand upon the pleadings was thereupon made (R. p. 29) and the court below entered judgment, dismissing the action with costs (R. pp. 30, 31).

The petition for writ of error and assignment of errors was served, filed and allowed a writ of error and citation thereunder issued (R. pp. 32-37).

The facts alleged in the complaint and admitted by demurrer are briefly as follows:

On November 26th, 1925, the plaintiff corporation's steamer "President Lincoln" arrived at the port of Honolulu enroute from Yokohama to San Francisco with one Seiichi Yamate on board as a steerage passenger for hire, he having embarked at Yokohama and being bound for Honolulu. Yamate was an alien holding a permit to re-enter the United States. He had been a resident of the Territory of Hawaii and domiciled therein for eighteen years continuously, the residence and domicile having been unrelinquished, and was returning after a temporary absence abroad of approximately three months.

Upon arrival at the port of Honolulu the alien passenger was landed but after examination refused admittance for the alleged reason that he was afflicted with a loathsome and/or dangerous contagious disease. The defendant, as Collector of Customs, purporting to act under the provisions of Section 9 of the "Immigration Act of 1917" as amended by Section 26 of the "Immigration Act of 1924" and despite the fact that the alien was returning to an unrelinquished United States domicile in excess of seven consecutive years' duration and despite the proviso to Section 9 of said Act, reading:

> "That nothing contained in this section shall be construed to subject transportation companies to a fine for bringing to ports of the United States aliens who are by any of the provisos or exceptions to Section 3 of this Act exempted from the excluding provisions of said section,"

and the proviso to said Section 3, reading:

> "That aliens returning after a temporary absence to an unrelinquished United States domicile of seven consecutive years may be admitted in the discretion of the Secretary of Labor, and under such conditions as he may prescribe,"

imposed against the transportation company, plaintiff in error herein, a fine of one thousand dollars ($1000.00) and transportation costs amounting to forty dollars ($40.00); and refused to grant clearance papers to the "President Lincoln" until payment thereof had been made. The complaint alleges that the fine was illegally imposed and collected and was paid under duress. (R. pp. 17-21.)

SPECIFICATION OF ERRORS.

I.

That the Court erred in sustaining the demurrer of the defendant to the second amended complaint of the plaintiff and in ordering judgment for the defendant.

II.

That the Court erred in entering judgment for the defendant and against the plaintiff.

III.

That the Court erred in holding and determining that the plaintiff, Dollar Steamship Line, was subject to the fine or penalty provided for by Section 26 of the "Immigration Act of 1924", for bringing to the United States an alien returning after a temporary absence to an unrelinquished United States domicile of seven (7) consecutive years (Seventh proviso, Sec. 3, Immigration Act, 1917), though it appears to the Secretary of

Labor that such alien was suffering from a dangerous and/or contagious disease at the time of embarkation, and that the existence of such disease may have been discovered by competent medical examination at the point of foreign embarkation.

IV.

That the Court erred in holding that under the facts set forth in plaintiff's second amended complaint, it could not go behind the finding of the Secretary of Labor that plaintiff was liable to fine.

V.

That the Court erred in holding and determining that plaintiff take nothing by the cause of action set forth in its second amended complaint herein. (R. pp. 33-34.)

ARGUMENT.

The question involved, that is, whether a carrier is liable to fine under the facts admitted and hereinafter set forth, is of the utmost importance to all carriers by water operating vessels between the United States and foreign ports. It arises by virtue of these admitted facts: The carrier in question returned from a temporary absence abroad, to an unrelinquished United States domicile of eighteen (18) consecutive years, an alien, the Secretary of Labor, upon such return, determining that the alien was afflicted with a dangerous contagious disease which should have been discovered by competent medical examination at the point of foreign embarkation.

The fine in question was assessed by reason of the provisions of Section 9 of the "Immigration Act of 1917", as amended by Section 26 of the "Immigration Act of 1924", such section reading:

> "That it shall be unlawful for any person, including any transportation company, other than railway lines entering the United States from foreign contiguous territory, or the owner, master, agent, or consignee of any vessel to bring to the United States either from a foreign country or any insular possession of the United States any alien afflicted with idiocy, insanity, imbecility, feeble-mindedness, epilepsy, constitutional psychopathic inferiority, chronic alcoholism, tuberculosis in any form, or a loathsome or dangerous contagious disease, and if it shall appear to the satisfaction of the Secretary of Labor than any alien so brought to the United States was afflicted with any of the said diseases or disabilities at the time of foreign embarkation, and that the existence of such disease or disability might have been detected by means of a competent medical examination at such time, such person or transportation company, or the master, agent, owner, or consignee of any such vessel shall pay to the collector of customs of the customs district in which the port of arrival is located the sum of $1,000, and in addition a sum equal to that paid by such alien for his transportation from the initial point of departure, indicated in his ticket, to the port of arrival for each and every violation of the provisions of this section, such latter sum to be delivered by the collector of customs to the alien on whose account assessed. It shall also be unlawful for any such person to bring to any port of the United States any alien afflicted with any mental defect other than those above specifically named, or physical defect of a nature which may affect his ability to earn a living, as contemplated in section 3 of this act, and if it shall appear to the satisfaction of the Secretary of Labor that any alien so brought to the United

States was so afflicted at the time of foreign embarkation, and that the existence of such mental or physical defect might have been detected by means of a competent medical examination at such time, such person shall pay to the collector of customs of the customs district in which the port of arrival is located the sum of $250., and in addition a sum equal to that paid by such alien for his transportation from the initial point of departure, indicated in his ticket, to the port of arrival, for each and every violation of this provision, such latter sum to be delivered by the collector of customs to the alien for whose account assessed. It shall also be unlawful for any such person to bring to any port of the United States any alien who is excluded by the provisions of section 3 of this act because unable to read, or who is excluded by the terms of section 3 of this act as a native of that portion of the Continent of Asia and the islands adjacent thereto described in said section, and if it shall appear to the satisfaction of the Secretary of Labor that these disabilities might have been detected by the exercise of reasonable precaution prior to the departure of such aliens from a foreign port, such person shall pay to the collector of customs of the customs district in which the port of arrival is located the sum of $1,000, and in addition a sum equal to that paid by such alien for his transportation from the initial point of departure, indicated in his ticket, to the port of arrival, for each and every violation of this provision, such latter sum to be delivered by the collector of customs to the alien on whose account assessed.

" 'If a fine is imposed under this section for the bringing of an alien to the United States, and if such alien is accompanied by another alien who is excluded from admission by the last proviso of section 18 of this act, the person liable for such fine shall pay to the collector of customs, in addition to such fine but

as a part thereof, a sum equal to that paid by such accompanying alien for his transportation from his initial point of departure indicated in his ticket to the point of arrival, such sum to be delivered by the collector of customs to the accompanying alien when deported. And no vessel shall be granted clearance papers pending the determination of the question of the liability to the payment of such fines, or while the fines remain unpaid, nor shall such fines be remitted or refunded: Provided, that clearance may be granted prior to the determination of such questions upon the deposit of a sum sufficient to cover such fines or of a bond with sufficient surety to secure the payment thereof, approved by the collector of customs. . . . . . .'"

"PROVIDED FURTHER, THAT NOTHING CONTAINED IN THIS SECTION SHALL BE CONSTRUED TO SUBJECT TRANSPORTATION COMPANIES TO A FINE FOR BRINGING TO PORTS OF THE UNITED STATES ALIENS WHO ARE BY ANY OF THE PROVISOS OR EXCEPTIONS TO SECTION 3 OF THIS ACT EXEMPTED FROM THE EXCLUDING PROVISIONS OF SAID SECTION."

(43 Stat. L. 166, Fed. Stat. Ann. 1924 Supp. p. 50, sec. 26.)

The proviso being general, that is, applying to all that precedes it rather than any particular clause or portion thereof, it follows as a matter of common understanding that certain diseased or defective aliens may be brought to the United States without subjecting transportation companies to the fine provided in the body of the section. The class of persons that may be brought the proviso settles by reference to "*aliens who are by any of the provisos or exceptions to Section*

3 of this Act exempted from the excluding provisions of said section."

Section 3 of the "Immigration Act of 1917", to which section we are referred by Section 9 above mentioned, excludes from admission to the United States idiots, imbeciles, feeble-minded persons, professional beggars, vagrants, persons afflicted with a loathsome or dangerous contagious disease, persons mentally or physically defective when the defect may impair the ability to earn a living, those having committed a felony, and persons who believe in or advocate the overthrow by force or violence of the government of the United States or any organized government, and many other classes of the same general character. There are many provisos to Section 3, some of them specifically referring only to the paragraph or paragraphs preceding them, while others, without question, are provisos to the entire section. The seventh proviso to Section 3 reads as follows:

> "PROVIDED FURTHER, THAT ALIENS RETURNING AFTER A TEMPORARY ABSENCE TO AN UNRELINQUISHED UNITED STATES DOMICILE OF SEVEN CONSECUTIVE YEARS, MAY BE ADMITTED IN THE DISCRETION OF THE SECRETARY OF LABOR, AND UNDER SUCH CONDITIONS AS HE MAY PRESCRIBE."

(39 Stat. L. 875, Fed. Stat. Ann. 1918 Supp. pg. 214.)

Aliens coming within the purview of this proviso are not excluded and constitute a class exempted from the excluding provisions.

"Exempt" is defined by Webster as "free or released

from some liability to which others are subject; excepted from the operation or burden of some law; released; free, clear, privileged, etc."

Aliens who are returning to an unrelinquished United States domicile of the proper duration of time are "free or released from some liability to which others are subject, excepted from the operation or burden of some law", and are therefore exempted from the excluding provisions. The alien in question was possessed of a return permit which, under the law—Section 10 sudivision F—as alleged by the complaint, shows that he was returning from a temporary visit abroad and the allegations of the complaint, as admitted by demurrer, clearly place him within the conditions of the proviso.

There is no attempt in the language of the seventh proviso to Section 3 to distinguish in any way between diseased, feeble-minded, illiterate or physically defective aliens, and the only condition imposed is that such aliens must be returning to their former United States domicile to present their case for readmission to the Secretary of Labor if the transportation company is to avoid payment of a fine.

It must be admitted that a blind person would be excluded under the general provisions of Section 3, and that under the provisions of Section 9 the physical defect would be of a nature which would subject the transportation company to a fine for attempting to provide means of entrance for such an alien to the United States.—but under the seventh proviso, if a blind alien were transported by a carrier to a port of the United States on the ground that he was returning to an un-

relinquished domicile, there would certainly be no fine imposed upon the carrier whether or not that alien was able to establish, to the satisfaction of the Secretary of Labor, that he was possessed of sufficient means so that his disability would not make him a charge upon this country.

For the sake of bringing before the Court a specific example, we mention the following case, which will no doubt apply to hundreds in the territory and to hundreds of thousands of others in the United States:

Y. Ahin has lived in the territory for many years. He is one of the so-called "Chinese monied princes". He is now blind or practically so. Under the defendant's theory, if followed to its logical conclusion, should Ahin go to China for a temporary visit, he would be precluded from returning to the United States, his ailment being one which would prevent his earning a living, and the transportation line that brought him would be liable to fine. The conclusion is, of course, ridiculous, for upon proof of his financial condition, the Secretary would, no doubt, admit him under the seventh proviso to Section 3 "as an alien returning after a temporary absence to an unrelinquished United States domicile of seven consecutive years."

And if Ahin, though blind, can return to his domicile and without question be admitted by the Secretary of Labor in the exercise of the discretion granted him under the Act, what provision is there which renders a carrier liable if it return him sick rather than blind? The closest scrutiny of the Act fails to reveal any attempt to discriminate in any manner whatsoever between the various degrees of sickness or disability, and

we submit that there was no intent on the part of Congress to penalize carriers for returning to their unrelinquished United States domicile aliens, even though ill.

Daily we witness the immigration authorities permitting the landing of returning resident aliens suffering from trachoma, a dangerous contagious disease, and their admission to Hawaii subsequent to cure, and we find the rules promulgated by the Department of Labor, authorizing such action (see Rule 16 Rules of July 1, 1925).

When the Department has construed the law to permit the promulgation of such a rule, it can hardly be said that the policy of the law is against the bringing of certain specified aliens who are diseased to our shores. And the Court may consider the construction placed on the law by the Department.

(Vol. II Ency. U. S. Sup. Ct. Rep. p. 138.)

The question in this particular case does not have to do with any one disease or disability, nor is it one of admission or rejection, but is rather the construction of the statute and that construction must proceed irrespective of the particular thing being considered. The Secretary of Labor is vested with untrammelled discretion (that this is true, note the fact that the proviso does not start with the usual "if otherwise admissible") which he may exercise in the case of certain aliens who have been residents or domiciled in the United States for more than seven (7) years. The only possible way in which that discretion may be exercised is by having the alien returned to a United States port

and there allowing him to present his case to the Secretary. This principle has very recently been announced in the case of,—

> *Compagnie Francaise De Navigation A Vaperu v. Elting, Collector of Customs,* Circuit Court of Appeals, Second Circuit, May 9, 1927, No. 287 (Fed. Rep. Adv. Sheets, Vol. 19 (2d) No. 6 at page 773).

In this case the transportation company was fined for bringing to the port of New York an alien of Italian nationality who claimed to be returning from a temporary visit abroad to an unrelinquished American domicile. The fine was paid under protest and the action brought to recover it. The regulations promulgated pursuant to the statute under consideration provided that if the alien resided outside of the United States for more than six months he was presumed to have relinquished his domicile but that that presumption might be rebutted by evidence to the contrary. In this case the alien failed to establish, to the satisfaction of the appropriate officer, that he had not abandoned his domicile, and was ordered deported and the steamship company fined. The contention of the plaintiff was that under the Act the alien was given the privilege of presenting evidence to overcome the presumption and that the evidence could only be presented to an immigration official after the alien had arrived in this country, and hence, he was entitled to come to a port of the United States for such purpose and that the transportation company had the privilege of bringing him without incurring any penalty,

irrespective of whether or not the alien might later be deported. The court said:

> "We think this position is well taken. To hold that the transportation company acts at its peril in bringing an alien who claims to be exempt from the quota would be a practical denial to the alien of the privilege of presenting his evidence. No company would bring him on such terms. To hold that the company must investigate the merits of the alien's claim, and is privileged to bring only such aliens as it thinks ought to be admitted, is to make it, rather than the immigration officials, pass upon the alien's claim, which is not the privilege granted the alien by the regulation.
> . . . . . .
>
> "Diligent inquiry would have disclosed merely the facts which the alien submitted at his hearing, and the sufficiency of those facts had to be passed upon by the immigration officials at such hearing before the alien's admissibility could be ascertained. . . . .
>
> "It can scarcely be supposed that Congress intended to penalize a vessel owner for transporting an alien privileged to come for such purpose. The purpose is not to be imputed, in the absence of plain language, to penalize an act innocent of intentional wrong."
>
> Fed. Rep. Advance Sheets, Vol. 19, 2d., No. 6, at page 774.

The judgment of the lower court in affirming the assessment of the fine was reversed and the cause remanded with directions to enter judgment for the plaintiff.

The cited case is the instant case. Here we have Congress saying in plain English to carriers, "If you bring to our shores certain defective aliens you shall pay a penalty of One Thousand Dollars, but no pen-

alty shall be paid if these defectives come within a certain category."

Congress then says: "Within this category, are certain aliens who have been domiciled here for a continuous period of seven years and are returning. Bring them, that the Secretary may admit or reject them in his discretion."

To hold that the above is not what Congress says is to subvert the English language and to nullify both provisos, for no carrier would return such aliens if admission were a condition precedent to non-liability.

CONCLUSION.

There is no question in this case of the good faith of the carrier. The admitted allegations of the complaint (R. par. V. pp. 18-19) show that the utmost care was employed on its behalf by different examining physicians to assure the particular alien's freedom from disease at the time of foreign embarkation and during the period of travel. We believe this was in excess of the requirements of the statute but it amply demonstrates the innocence of intentional wrong.

The statute under which the fine in question was assessed is highly penal in its nature. Its obvious and natural meaning is as above outlined, and this meaning, we feel, should be confirmed by this Court.

It is, therefore, respectfully contended that the demurrer to the second amended complaint should have

been overruled and such order should be entered herein.

Dated at Honolulu, T. H., this 9th day of September, A. D. 1927.

Respectfully submitted,

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